THE MATTER OF ARBITRATION BETWEEN

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 949,	)	
Union,	)	
and	)	**REORGANIZATION GRIEVANCE**
PEOPLE'S ENERGY COOPERATIVE,	)	
Employer.	)	**FMCS Case No. 151218-52302-8**

Arbitrator:	Stephen F. Befort
Hearing Date:	May 12, 2015
Post-hearing briefs received:	June 15, 2015
Date of Decision:	July 10, 2015
	APPEARANCES
For the Union:	Richard L. Kaspari
For the Employer:	Robert S. Halagan

INTRODUCTION

International Brotherhood of Electrical Workers, Local 949 (Union), as exclusive representative, brings this grievance claiming that People's Energy Cooperative (Employer) violated the parties' collective bargaining agreement by unilaterally implementing a Line Department reorganization that is not consistent with the terms of the parties' agreement. The Employer contends that the implemented reorganization plan is reasonable and is not in conflict

with the parties' agreement. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

1. Did the Employer violate Sections VI (N) and (Q) of the parties' collective bargaining agreement when it implemented the Line Department reorganization? If so, what is the remedy?

2. Did the Employer violate Section 8(a)(1) of the NLRA by statements made to part-time employees on or about December12, 2014? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE II.
Union & Cooperative Security

A. 1. Neither the Cooperative nor any of its supervisors will discriminate against any member of the Union on account of such membership, nor will the Cooperative assist or support any employee or group of employees with the intent of undermining the Union.
. . . .

B. The control and supervision of all operations and the direction of all working forces, including the right to hire and to determine the qualifications, job requirements, scheduling, hours of work and the size and character of the working forces are vested exclusively in the Cooperative. Its decision relative to these matters shall be final except as modified by the provisions of this Agreement.

The Cooperative reserves the right to alter existing practices if appropriate to meet the needs of members. Notwithstanding the preceding sentence, the Cooperative agrees that the following practices will continue in effect for the term of this agreement:

- Minimum of two employees on call out list.
- Minimum of two person crew for after hours call out for construction or maintenance on transmission or distribution lines.
- Medical Insurance Committee

. . . .

ARTICLE VI.
Classifications & Wages: Schedule of Hours

A. The occupational classifications and rates of pay are listed in SCHEDULE "A". These rates shall prevail for the duration of the Agreement. Nothing herein contained shall prevent the Cooperative from changing operating and production methods, hours of work as necessary or adopting new methods or creating new occupational classifications on new or changed methods. The rates of pay for new classifications shall be negotiated with the Union.

. . . .

K. Overtime is to be as equally distributed as practicable among the employees provided they are qualified to do the required work on such call for overtime.

. . . .

N. An employee charged with the responsibility of stand-by duty shall be expected to respond to a call out within ten (10) minutes of dispatch placing the first call out. The employee will be expected to report for duty at the assigned location within thirty (30) minutes or less of the first call out provided that the Cooperative and the Union may agree upon different response time requirements for individual employees. Each employee on stand-by is expected to be fit for duty. Employees who are ill are required to contact their supervisor immediately so that a replacement for stand-by duty can be identified.

The employee on stand-by duty must find his/her own replacement in the event of vacation. A pager or cell phone will be furnished to employees for use during stand-by duty at Cooperative expense. It is the responsibility of the employee to inform the Cooperative of any damage to or malfunction of the equipment on a timely basis so that repairs or a replacement may be made.

Stand-by duty will be set up using the current call out list. Stand-by duty assignments start at Thursday 4:00 p.m. and run until 4:00 p.m. the following Thursday. If the Thursday is a Cooperative holiday, stand-by will extend an additional eight (8) hours until midnight Thursday; at such time, the next stand-by duty assignment starts. If required to serve stand-by duty on a designated paid holiday, the employee on stand-by duty shall receive an additional eight (8) hours of vacation, provided they were called in to work on the given holiday. An employee on stand-by duty shall earn eight (8) hours of pay each week served on stand-by.

. . . .

P. An employee hired on a temporary basis (less than six months) as a laborer will be exempt from benefits.

Q. The following classifications of employees, subject to emergency after-hours duty, shall live within 20 minutes or 15 miles, whichever is less, of their assigned work reporting location. These positions include – Crew Leader, Maintenance Lineworker, First Class Lineworker, and Apprentice Lineworker.

Employees hired prior to May 1, 2010 and covered by this requirement who change the location of their residence after May 1, 2010 will be required to live within 20 minutes or 15 miles (whichever is less), of the Oronoco Crossings headquarters.

Employees hired after May 1, 2010 must move to within 20 minutes or 15 miles (whichever is less) of the Oronoco Crossings headquarters, or other locations specified by the Cooperative, within six months of their hire date. This requirement includes employees who may not initially be subject to emergency, after-hour duty, but may be expected to assume such duty as their training and experience increases.

The driving time determination shall be made by the immediate supervisor, driving from the usual parked location at the residence to the usual parked location at the assigned work location using a safe and legal driving manner on a normal work day.

Exceptions to this policy may be approved by the department head and President/CEO.
. . . .

ARTICLE VII.
Probationary Period

A. Probationary employees may be dismissed at any time without recourse to the grievance procedure.

B. New employees shall be considered probationary employees until they have worked in a classification covered by the Agreement for six (6) months.

ARTICLE VIII.
Seniority

E. 1. Promotions shall be based on qualifications and seniority. Qualifications being equal, seniority shall prevail.

FACTUAL BACKGROUND

The Employer is an electrical distribution cooperative that serves approximately 14,000 homes and businesses in southeastern Minnesota. IBEW Local 949 represents a bargaining unit of approximately 22 employees who construct and maintain the employer's electrical distribution system.

This grievance arises from a unilaterally implemented restructuring plan developed to coincide with a significant expansion in the Employer's distribution territory. In 2013, the

Southern Minnesota Energy Cooperative, a coalition of electrical cooperatives of which the Employer is a member, entered into an agreement to purchase distribution areas from Interstate Power and Light (IP & L), a subsidiary of Alliant Energy. The purchase, which needs regulatory approval and is expected to be completed by the fall of 2015, would increase the Employer's distribution network by 7,000 new accounts. The expansion also would add new distribution territory in southeastern Minnesota at some distance from the Employer's current headquarters in Oronoco, Minnesota.

Recognizing that the IP & L purchase posed both a significant opportunity and challenge, the Employer hired a new Operations Manager, Troy Swancutt, a former IP & L employee, to oversee the transition. A major objective of the transition was to devise a plan for efficiently responding to emergency calls in the expanded territory.

Prior to the new plan, the Employer handled after-hour emergencies through the use of a rotating stand-by list of lineworkers. In the event of an interruption in electrical service, the two lineworkers on the stand-by list for that week would be summoned to Oronoco and then dispatched to the site of the interruption. Lineworkers serving on the stand-by list would receive an additional eight hours of pay for that week.

On June 17, 2014, Mr. Swancutt presented a restructuring proposal to the members of the bargaining unit. The plan involved the creation of two new higher paid lineworker positions and the division of the Employer's distribution territory into six service areas. Under this plan, the previous maintenance lineworker positions would be replaced by two new job classifications: lead area lineworker and area lineworker. The plan called for the assignment of one lead area lineworker and one area lineworker to each of the six geographical areas. This original plan contemplated the elimination of the stand-by list with all emergency outage calls handled by the

lineworkers assigned to the area experiencing the outage. The plan also proposed a residency requirement that would compel all area lineworkers to reside within ten miles or ten minutes of the reporting location for their assigned area.

The parties met three times during July 2014 to discuss the Employer's restructuring plan. The Union objected to several facets of the proposal including the elimination of the stand-by list and the more restrictive residency requirement. By the end of the month, the Employer modified its proposal in two respects. First, the Employer proposed to retain the use of the stand-by list as a third-tier response to handling emergency calls if lineworkers in the area of the outage and those in the next closest area were not available to respond to an after-hours outage. The Employer's proposal was coupled with a requirement that area lineworkers handle a minimum of 60% of all emergency calls occurring in their assigned area. Second, the Employer modified its residency requirement proposal to establish the contract's 20 minute/15 mile standard as a minimum qualification standard for the area assignments for employees hired prior to September 24, 2014. The Employer, however, indicated that it would consider residency beyond the minimum requirement in making area assignments.

On July 28, 2014, the parties agreed to a one year extension of their existing collective bargaining agreement which had been set to expire as of October 1, 2014. The parties agreed that the extension would not affect any rights with respect to the proposed restructuring plan.

With the Union continuing to oppose the Employer's modified proposal, the Employer signaled its intent to implement that proposal on a unilateral basis. On August 4, 2014, the Employer posted all of the new area positions, but no employees submitted bids for the positions. The Union filed a grievance challenging implementation of the proposal on August 14, 2014.

Despite the Employer's announced implementation and the Union's grievance, the parties agreed to hold those actions in abeyance while they continued discussions concerning the reorganization plan. During these discussions, the Employer proposed to utilize the stand-by list as a second tier response to emergency outages, with area lineworkers designated as the first call-out responders and required to handle a minimum of 50% of all emergency calls. Once again, this round of discussions did not achieve an agreement.

The Employer implemented its most recent proposal on September 24, 2014 and once again posted all 22 bargaining unit positions. When the unit employees again declined to bid on these positions, the Employer unilaterally designated area assignments on October 10, 2014.

The parties then engaged in mediation in an attempt to resolve their ongoing disagreement. While that process did not result in an agreement, the parties did agree to submit the Employer's most recent proposal to a vote of the unit members on December 18, 2014.

On December 12, 2014, Elaine Garry, the Employer's President and CEO, summoned three temporary employees - Chad Mathees, Tyler Steinbrink, and Kyle Kowalewski – to a meeting at Company headquarters. Under the parties' collective bargaining agreement, the Employer may employ temporary workers only for a maximum of 1000 work hours. This deadline was fast approaching, and the three employees were worried that they would not be retained because of the continued uncertainty surrounding the IP & L purchase and the proposed restructuring plan.

According to the testimony of both Mr. Mathees and Mr. Steinbrink, Ms. Garry told the three temporary workers that the Cooperative wanted to hire them for permanent positions, but if the restructuring proposal was not approved, the Employer would have to divert funds to pay for the cost of an arbitration proceeding and might not have sufficient funds remaining to convert the

three temporary positions into permanent positions. She urged the temporary employees to lobby other unit employees to vote in favor of the Employer's proposal. In her testimony, Ms. Garry admitted urging the three employees to support the Employer's proposal, but denied telling them that they would be laid off if the proposal was not approved.

On December 18, 2014, the members of the bargaining unit rejected the Employer's final reorganization proposal. The parties nonetheless agreed that the three temporary employees could be hired on a permanent basis subject to the condition that the Employer would be permitted to terminate the employees without recourse if the IP & L purchase did not receive final regulatory approval.

At this point, the Union reasserted its grievance and demanded that the dispute proceed to arbitration. The Union also filed two unfair labor practice charges with Region 18 of the National Labor Relations Board (NLRB). By a letter dated March 11, 2015, the NLRB deferred resolution of the unfair labor practice charges to this arbitration proceeding. At the May 12, 2015 arbitration hearing, the parties narrowed the scope of the dispute to the issues noted above.

POSITIONS OF THE PARTIES

Union

The Union acknowledges the Employer's right to restructure its operations, but asserts that it cannot unilaterally implement changes that are inconsistent with the terms of the parties' collective bargaining agreement. The Union contends that the restructuring plan implemented by the Employer conflicts with the parties' agreement in two respects. First, the Union maintains that the new residency requirements adopted by the Employer are more restrictive than that authorized by Article VI, Section Q of the agreement. Second, the Union argues that the new 50% after-hours outage response requirement for area lineworkers is inconsistent with Article

VI, Section N of the agreement. Finally, the Union claims that Ms. Garry's remarks to the three temporary employees in December 2014 were coercive and in violation of section 8(a)(1) of the NLRA.

Employer

The Employer maintains that it possesses the inherent managerial right to implement its restructuring proposal. While the Employer acknowledges that the contract establishes the minimum residency qualification standards for a position, the Employer contends that language does not overrule the Employer's authority to assess relative qualifications in making assignments and promotions which may include an employee's proximity to a reporting location. The Employer further argues that its implemented plan does not run afoul of Article VI, Section N of the agreement since the new policy maintains the stand-by list and continues to pay employees for their time on the list. The Employer finally contends that Ms. Garry's comments to the three temporary workers did not constitute an unfair labor practice because those comments constituted neither a threat nor a promise of benefit.

DISCUSSION AND OPINION

The Residency Requirement

As with any contract interpretation case, the appropriate starting point for analysis is with the language of the parties' collective bargaining agreement. Here, three provisions are arguably relevant. First, Article I.B. reserves for the Employer "the control and supervision of all operations and the direction of all working forces." This provision also reserves the Employer's "right to alter existing practices if appropriate to meet the needs of members." Second, Article VI, Section Q provides:

> The following classifications of employees, subject to emergency after-hours duty, shall live within 20 minutes or 15 miles, whichever is less, of their assigned work reporting location. These positions include – Crew Leader, Maintenance Lineworker, First Class Lineworker, and Apprentice Lineworker.
>
> Employees hired prior to May 1, 2010 and covered by this requirement who change the location of their residence after May 1, 2010 will be required to live within 20 minutes or 15 miles (whichever is less), of the Oronoco Crossings headquarters.
>
> Employees hired after May 1, 2010 must move to within 20 minutes or 15 miles (whichever is less) of the Oronoco Crossings headquarters, or other locations specified by the Cooperative, within six months of their hire date. This requirement includes employees who may not initially be subject to emergency, after-hour duty, but may be expected to assume such duty as their training and experience increases.

Finally, Article VIII, Section E(1) states that "promotions shall be based on qualifications and seniority. Qualifications being equal, seniority shall prevail."

As a basic principle, management possesses the right to manage and direct its operations, subject to the limitations established by law or a collective bargaining agreement. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 13-5 to 13-8 (7th ed. 2012). That principle is bolstered in this instance by the management rights preserved in Article I.B. of the parties' agreement.

The Union contends that the Employer's implemented proposal is inconsistent with the terms of Article VI, Section Q in two respects. First, new employees, including the three recently hired employees working in area positions, will be required to live or move within ten minutes or ten miles of their assigned service area as opposed to the "20 minutes or 15 miles" provided by Section Q. Second, while the Employer's policy utilizes the "20 minutes or 15 miles" residency requirement for employees hired prior to September 24, 2014, the Employer's policy essentially rescinds the agreement's grandfather provision exempting employees hired prior to May 1, 2010 from the operation of that requirement until such time as the employee makes a change in residence.

The Employer offers two defenses to the Union's claim. First, the Employer asserts that the Article VI, Section Q residency requirement does not apply by its terms to the new lead area lineworker and area lineworker positions. But Section Q is not limited to the listed job classifications but also applies to all employees "subject to emergency after-hours duty." In any event, it would be a victory of form over substance to permit the Employer to structure an exemption from the agreement's requirements through a mere change in job titles.

As a second line of defense, the Employer argues that while the "20 minutes or 15 miles" provision establishes a minimum residency standard, the Employer can utilize more demanding residency criteria pursuant to Article VIII, Section E(1) as a qualification standard in determining promotions. I find this argument unpersuasive for two reasons. First, the "20 minutes or 15 miles" language of Article VI, Section Q is more specific than the qualification language of Article VIII, Section E(1). Second, Mr. Swancutt testified at the arbitration hearing that the Employer does not consider an employee's residence location as a qualification issue so long as the employees lives within the "20 minutes or 15 miles" parameter. Following a break in the hearing, the parties stipulated that the Employer will apply the agreement's residency requirement in a manner consistent with Mr. Swancutt's testimony. Consistent with that stipulation, I find the Employer's qualification argument to be foreclosed.

In sum, the Employer's implemented policy imposes residency standards that are not consistent with the parties' collective bargaining agreement. As such they cannot stand.

The Stand-By Requirement

Prior to the implemented proposal, the parties handled off-duty emergency calls through a rotating stand-by list. Each week two lineworkers would be on stand-by duty. They would be responsible for handling all outage calls after first reporting to Oronoco, and they would receive eight hours of extra pay for that week.

The proposal implemented by the Employer changes that arrangement. The Employer created six areas or zones with primary responsibility for handling emergency calls in each area now handled by the area lineworkers assigned to that territory. Area lineworkers are required to handle a minimum of 50% of all emergency calls in their area or face the possibility of discipline. The Employer still utilizes the rotating stand-by list for emergencies, but only as a back-up to the area lineworkers. The top two employees on the stand-by list continue to receive eight hours of extra pay for the week.

The Union claims that the new arrangement violates the parties' contract which provides in Article VI, Section N that "stand-by duty will be set up using the current call out list." The Union argues that the Employer's implemented proposal runs afoul of this language by making the area lineworkers principally responsible for stand-by duty as opposed to the employees on the callout list. In addition, the Union points to Article VI, Section K which states that "overtime is to be as equally distributed as practicable." The Union maintains that the Employer's preference for assigning emergency work to area lineworkers necessarily will result in the area lineworkers receiving more overtime work than non-area employees such as those employees assigned to construction work.

The Employer counters by asserting that while the contract refers to the stand-by list, it does not address the order of call-outs in the event of an emergency. The Employer also

argues that it is too early to tell whether the new arrangement will result in an unequal distribution of overtime opportunities.

The Employer has the better of this argument. The implemented proposal basically complies with Section N since it continues to use the stand-by list for emergencies and continues to provide eight hours of extra pay for service on that list. At this time, it is not clear whether the requirement that area lineworkers handle 50% of all emergency calls for their assigned territory will skew the distribution of overtime. If that turns out to be the case, a latter challenge is not foreclosed.

The Unfair Labor Practice Charge

The Union finally claims that the Employer violated NLRA § 8(a)(1) by interfering with and coercing employees in the exercise of protected rights. The Union contends that President Garry impermissibly suggested to three temporary employees that the Employer may not be in a financial position to hire them on a permanent basis if the unit employees failed to vote in favor of the Employer's restructuring proposal. The Employer responds by arguing that NLRA § 8(c) makes the expression of opinion not unlawful unless it amounts to a threat of reprisal or a promise of a benefit.

Ms. Garry's comments at the December 12, 2014 meeting comes very close to the line. Given Ms. Garry's position of authority and the precarious nature of the temporary workers' employment, the comments likely did send a powerful message. But, in the broader circumstances of this case, I do not think that she either promised the benefit of continued employment or threatened the loss of potential employment based upon the temporary workers support of or opposition to the Employer's proposal. Accordingly, the practice charge is not sustained.

AWARD

The grievance is sustained in part and denied in part. The Employer is directed to rescind that portion of its implemented proposal that is inconsistent with Article VI, Section Q and to rebid the area positions using the correct residency guidelines. The arbitrator will retain jurisdiction for 90 days to determine any remedial issues that may arise in implementing this decision.

Dated: July 10, 2015

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Stephen F. Befort
Arbitrator